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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1008

WILLIAM CAHALAN,
Petitioner,

v.

LEE DELL WALKER, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William L. Cahalan, Prosecuting Attorney for the County of Wayne, by and through his attorneys, Theodore Stephens, Chief, Civil Department, Stephanie Masis and Rheo C. Marchand, Assistant Prosecuting Attorneys for the County of Wayne; Aloysius J. Suchy, Corporation Counsel, County of Wayne and Dean Koulouras, Assistant Corporation Counsel for the County of Wayne, respectfully petition that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the captioned case on October 8, 1976 and the Order denying Petition For Rehearing entered on November 5, 1976.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated October 8, 1976, not as yet reported, appears as Appendix A. The Order denying petitioner's Motion for Rehearing and dated November 5, 1976, is appended as Appendix B. The Opinion of the United States District Court for the Eastern District of Michigan, Southern Division is shown as Appendix C and is not officially reported.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was decided and filed on October 8, 1976 [Appendix A]. Timely Petition for Rehearing was filed by petitioner and the Order of the Court of Appeals denying Petition for Rehearing was entered on November 5, 1976 [Appendix B]. This Petition For Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I.

Where the Wayne County Michigan prosecutor sends a letter to members of the State House Committee On Appropriations and to the media opposing a pending legislative bill to compensate respondent with $25,000 of public funds for his claimed wrongful conviction:

> Was it error for the Court of Appeals for the Sixth Circuit to hold, contrary to Michigan law, that the prosecutor did not enjoy an absolute privilege for defamation arising out of the exercise of the official duties of his public office, but instead was clothed only with a qualified privilege defeasible by a showing of common law malice?

II.

Where respondent herein concedes that it was proper for the Prosecutor to send his letter to members of the Legislature; that he is a "public figure", and that the *New York Times* standard applies:

> Was it error for the United States Court of Appeals for the Sixth Circuit to apply the "actual malice" rule of *New York Times* only to the media defendant and not to the public prosecutor?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments I and XIV provide:

> Amendment I — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Respondent, Lee Dell Walker, brought an action in the Circuit Court for the County of Wayne, Michigan, against defendants William L. Cahalan, the Prosecuting Attorney for the County of Wayne, Michigan, and the Detroit News and one of its reporters Pete Waldmeir. Plaintiff complained of Prosecutor Cahalan's September 19, 1974, letter [Appendix E] to the chairman and members of the Michigan Legislature's House Committee on Appropriations opposing a bill which would appropriate $25,000 of public funds as compensation to respondent Walker for his claimed wrongful conviction of murder in the City of Detroit in 1954 and his subsequent imprisonment. Plaintiff further complained of the September 26, 1974 publication by The Detroit News of the contents of this letter, which was sent by the prosecutor to the media. The legislative bill stated its purpose as "to partially reimburse Lee Dell Walker . . . . for time spent in state prison due to mistake in identity and false testimony". Its preamble was worded "solely out of humanitarian consideration for the wrong done Lee Dell Walker by the citizens of the State". [Appendix D]. In stating his opposition to the proposed legislation,

petitioner Cahalan's letter cited publicly known facts, including records of the prosecutor's office and the Detroit police department to explain why the prosecutor's office had not retried Walker in 1972 after his 1954 conviction was set aside. Respondent alleged that these publications were libelous, a "false light" invasion of his privacy and further that they violated his civil rights under 42 USC §1981 and §1983. [Respondent later abandoned his claim for relief under 42 USC §1981 and announced that he would rely only upon 42 USC §1983.]

Defendants removed the entire action to the United States District Court for the Eastern District of Michigan, Southern Division. Upon a voluminous record as to the undisputed facts, the District Court granted defendants Motions for Summary Judgment as to respondent Walker's claims for libel and invasion of privacy. [Appendix C]. In response to a Motion For A More Definite Statement, respondent was then ordered to plead any additional facts supportive of his federal civil rights claims and, after Respondent Walker amended his complaint, the Court granted defendants summary judgment on the civil rights claims.

On appeal to the United States Court of Appeals, respondent conceded the propriety of the Wayne County prosecutor's sending his letter to the members of the House Appropriations Committee; as well as conceding that he was a "public figure" and that the *New York Times* First Amendment libel standard applies, complaining only as to the dissemination of the letter to the public through the press [Respondent's Court of Appeals Brief — pages 23 and 29] [Also Appendix A — p. 18].

On appeal the Court of Appeals for the Sixth Circuit affirmed as to the newspaper and its reporter, but as to the public prosecutor affirmed only as to the

civil rights claim, remanding the defamation claim to the United States District Court "for a determination of the absence or presence of (common law) malice". [Appendix A — p. 21].

Petitioner contends that the Court of Appeals' decision to remand on the state count was contrary to controlling state law which would grant absolute immunity to the prosecutor, and was also in error in applying the Constitutional "actual malice" privilege enunciated in the *New York Times* case to the media defendant while holding that the lesser standard of common law malice applied to the non-media defendant.

REASONS FOR GRANTING THE WRIT

I.

In the State of Michigan, public officials have long been cloaked with an absolute privilege out of and in connection with the performance of their public office.

In the present case, the Court of Appeals for the Sixth Circuit agreed with the finding of the District Court that in sending his letter to the legislature and releasing it to the press, the Wayne county prosecutor was acting within the scope of his general powers. However, the Court refused to hold that an absolute privilege existed and ruled that the prosecutor, being only qualifiedly privileged, the case should therefore be remanded for the purpose of affording an opportunity to prove whether the prosecutor acted with common law malice:

> "Therefore, we reverse the district court's granting of a summary judgment as to the prosecutor's liability under the state charges, and remand for a determination of the absence or presence of malice. In all other respects the Judgment of the District Court is affirmed." [Appendix A — p. 21].

This holding is contrary to Michigan law and was apparently based on legal principles which govern federal statutory actions rather than state actions.

In the instant case the District Court found, as a matter of law, that the Prosecutor was absolutely privileged in reporting to both the legislature and to the public matters which were within the scope of his duty as an executive officer [Appendix C — p. 23]. The District Court held that:

> "This bill was nothing short of an absolute condemnation of the prosecutorial process in the State of Michigan and particularly in the County of Wayne and City of Detroit. Whatever the outer limits of the prosecuting attorney's responsibilities I don't have to define. I am satisfied that he was acting clearly within the scope of his function as an executive officer."
>
> * * *
>
> "What Mr. Cahalan's letter was pointing out was that it was an effort by him to prevent the legislature from passing a bill which would seriously detract from his ability, the ability of his office to function effectively."
>
> * * *
>
> "Let's assume for a moment that he would be liable but for privilege, I am satisfied that Mr. Cahalan was acting with the cloak of absolute privilege in writing this letter. It isn't a qualified privilege as far as Cahalan is concerned, it's an absolute privilege." [Appendix C — p. 24].

This finding is in keeping with numerous Michigan decisions holding that an absolute privilege exists where

alleged defamatory statements are made in the course of carrying out an official duty and where the statements constitute an essential function of the official position held by the defendant. The executive privilege found to exist here was recognized in Michigan law beginning with *Trebilcock* v *Anderson*, 117 Mich 39, 75 NW129 (1898) holding absolutely privileged the publication of the defendant mayor's message to the Common Council wherein he stated his reasons for a veto which was then printed in the city's official newspaper.

Closely in point was the Michigan case of *Schlinkert* v *Henderson*, 331 Mich 284, 49 NW 2d 180 (1951) in which the Michigan Supreme Court held a Michigan Liquor Control Commissioner absolutely privileged in the writing of a letter critical of an employee to the state civil service commission and releasing it to several newspapers.

To the same effect were the holdings in *Bolton* v *Walker* 197 Mich 699, 164 NW 420 (1917); and *Powers* v *Vaughan*, 312 Mich 297, 20 NW 2d 196 (1945).

Decisions from other jurisdictions supportive of Michigan law are *Barr* v *Matteo*, 360 US 564, 79 S.Ct. 1335, 3 L Ed 2d 1434 (1959); *Glass* v *Ickes*, 117 F 2d 273, *cert den*. 311 US 718 (1940); *Spalding* v *Vilas*, 161 US 483, 16 S Ct 631, 40 L Ed 780 (1896); *Mattson* v *Margiotti*, 88 A 2d 892 (Pa., 1952); *Hackworth* v *Larson*, 165 NW 2d 705 (S.D. 1969). Also 58 Mich Law Rev 295 citing the application of the absolute privilege to, *inter alia*, state attorneys general, county district attorneys and assistant U.S. attorneys general.

Absolute privilege, once established, will then act as a bar to any claim for damages. However, at the outset, it is for the court to determine whether or not the external circumstances surrounding the publication are such as to give rise to a privileged occasion. In so doing, the Court

is merely exercising its normal exclusive function of determining what principles of substantive law are applicable to the situation presented. *Lawrence* v *Fox*, 357 Mich 134, 97 NW 2d 719 (1959).

It is, therefore, the occasion that determines the privilege and where that privilege is found by the court to be absolute, a verdict should be directed for the defendant. Such a finding was made by the District Court in the instant case.

In remanding the petitioner's cause to the District Court on the issue of common law malice the Court of Appeals, by way of authority, made reference to *Imbler* v *Pachtman*, ___ US ___ (1976), 47 L Ed 2d 128 (March 2, 1976); *Scheuer* v *Rhodes*, 416 US 232 (1974) and the Michigan case of *Bloss* v *Williams*, 15 Mich App 228, 166 NW 2d 520 (1966). Since the decisions in *Imbler* v *Pachtman* and *Scheuer* v *Rhodes*, *supra* were 42 USC §1983 actions, the Court of Appeals clearly decided the privilege issue in the present case within the context of federal law. Those cases differ from state causes and represent constitutional tort actions granted by Congress to private citizens and require an immunity doctrine unique to the purposes involved in their statutory creation. In *Scheuer, supra*, this Court refused to extend absolute immunity in Civil Rights Act actions to state executive officials acting within the scope of their authority and performing discretionary duties. Instead, the Court decided to create a qualified immunity for state executive officials who are endowed with discretionary powers and charged with violating the civil rights of private citizens. The immunity thus became a function of the official's good faith formed at the time of the alleged civil rights violation. This test was inappropriately applied by the Court of Appeals to a state common law action involving a defamation issue.

The Court's additional reliance upon the decision of the Michigan intermediate appellate court in *Bloss* v *Williams, supra* is no more helpful since the Michigan court, in its affirmance of the trial court order granting summary judgment, placed some weight in its dictum reference on the decision in *Bauers* v *Heisel*, 361 F 2d 581 (1966), another federal §1983 action. The *Bauers* court made clear that 42 USC §1983 should not be considered in derogation of common law unless it expressly so states or where the result is imperatively required from the nature of the action [p.587]. Furthermore the court in *Bauers* was discussing acts by persons which were clearly outside the scope of their official duties — such not being the present factual situation as found by both the U.S. District Court and the Court of Appeals.

Petitioner contends that once the act complained of is determined to be within the general powers of the public officer and is held to be absolutely privileged, from all of the circumstances and the nature of the occasion, any challenge made to the issue of privilege should be resolved in accordance with controlling state law including the applicable immunities and defenses.

In the present case this should have resulted in affirmance of the District Court's granting of summary judgment on the state issue of defamation.

II.

The rationale for the application of a constitutional libel privilege expressed in *New York Times Co.* v *Sullivan*, 376 US 254, 11 L Ed 2d 686 (1964) should apply in non-media as well as media contexts.

Where plaintiff is a public figure, *New York Times* prohibits a state from affording a civil action for libel unless the defendant's statements were not only false, but were published with "actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not". 376 US 254, 279-280. Such "actual malice" is a constitutional prerequisite to any permissible claim.

Although *New York Times* arose in a media context, the holding reflects no restriction of its application to *media* publications only, nor has the Supreme Court hesitated to apply it to *non-media* cases. In *Garrison* v *Louisiana*, 379 US 64, 85 S Ct 209, 13 L Ed 2d 125 (1954), the defamatory comments were made during a press conference, and in *St. Amant* v *Thompson*, 390 US 727, 88 S Ct 1323, 20 L Ed 2d 262 (1968) they were made during a televised speech. In both instances, the reasoning of the Court focused on the importance of free speech and public debate rather than on the protection of the media. Similarly, in non-media cases involving labor disputes the Court has found the constitutional privilege applicable. *Letter Carriers* v *Austin*, 418 US 264, 94 S Ct 2770, 41 L Ed 2d 745 (1974); *Linn* v *Plant Guard Workers*, 383 US 53, 86 S Ct 657, 15 L Ed 2d 582 (1966). A number of lower courts have also applied the New York Times standard to non-media defendants. *Jacron Sales Co., Inc.*, v *Sindorf*, 350 A 2d 688 (1976), *Evans* v *Rawson* 351 F Supp 279 (W.D. Va 1972).

The rationale for the application of a constitutional privilege in *New York Times* is that the defense of truth is not alone sufficient to assure free and open discussion of important public issues. As the Court stated:

> "The general proposition that freedom of expression upon public questions is secured by

the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v United States, 354 US 476, 484, 1 L Ed 2d 1498, 1506, 77 S Ct 1304. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' Stromberg v California, 283 US 359, 369, 75 L ed 1117, 1123, 51 S Ct 532, 73 ALR 1484. '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' Bridges v California, 314 US 252, 270, 86 L ed 192, 207, 62 S Ct 190, 159 ALR 1346, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' N.A.A.C.P. v Button, 371 US 415, 429, 9 L ed 2d 405, 416, 83 S Ct 328. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' United States v Associated Press, 52 F Supp 362, 372 (DC SD NY 1943).

* * *

Thus we consider this case against the background of a profound national commitment to

> the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Issues of public interest, therefore, should be afforded equal opportunity for expression in both media and non-media contexts. In keeping with the rationale of this Court's decision in *New York Times*, the need for a constitutional privilege should obtain in either case.

In the instant case, the Court of Appeals affirmed the District Court finding that, as to the media defendant, there was no showing of "actual malice" to meet the burden set forth in *New York Times*. The implication that the press enjoys greater First Amendment rights than members of the public generally does not readily accomodate itself to the reasoning of this Court in its *New York Times* decision.

By remanding this case to the United States District Court and affording plaintiff below an opportunity to avoid summary judgment by coming forth with evidence of "common law" malice, is inconsistent with the greater standard set forth in New York Times.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment and opinion of the Court below.

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APPENDIX A

OPINION OF THE COURT OF APPEALS

(United States Court of Appeals for the Sixth Circuit)

(Walker v. Cahalan, et al. No. 75-2328)

(Decided and Filed October 8, 1976)

Before: Celebrezze, Peck and Miller*, Circuit Judges.

Peck, Circuit Judge. The plaintiff, Lee Dell Walker, appeals from the order of the district court granting defendants' Motions for Summary Judgment.

This action for damages had its genesis in plaintiff-appellant's 1954 conviction for the first degree murder of grocery store owner John Drousitious. At trial, Walker's confession was introduced into evidence. On July 12, 1954, appellant was sentenced to life imprisonment. On May 15, 1972, after 18 years of attacks on the conviction in general and the voluntariness of the confession in particular, a judge of the Recorder's Court for the City of Detroit entered an opinion and order granting leave to file a delayed motion for a new trial, granting the motion for a new trial, and remanding appellant to the custody of the Wayne County Sheriff. The Michigan Court of Appeals denied the prosecutor's application for leave to appeal the Recorder's Court's determination, and on December 12, 1972, an order of *nolle prosequi* was entered.

On December 6, 1973, then state Senator Coleman Young introduced a bill in the Michigan legislature which

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*Honorable William E. Miller died April 12, 1976, and did not participate in the decision of this case.

provided for payment to appellant of $25,000 "to partially reimburse Lee Dell Walker . . . for time spent in state prison due to mistake in identity and false testimony." This bill was passed by the state senate, then was sent to the House of Representatives where it was referred to committee. While it was so pending, appellee Cahalan, Wayne County Prosecutor, sent a letter to the house committee, with copies to the press, including appellee newsman Waldmeir. This letter stated, *inter alia*, that:

> "No wrong was done to Lee Dell Walker. There was no false testimony. Lee Dell Walker was justly convicted of a crime that he committed — the murder of John Drousitious. . . . Lee Dell Walker murdered John Drousitious. There is no other conclusion that can be reached by any fair-minded person who reviews the evidence in this case. . . .
>
> "If Lee Dell Walker is to be rewarded with $25,000, give it to him for his persistence. Do not commit the final perversion of stating that a guilty man is innocent."

Appellee Waldmeir wrote a column based almost entirely upon Cahalan's letter, which was published by appellee Detroit News.

In January of 1975, appellant filed a complaint against defendants Cahalan and Waldmeir in Wayne County Circuit Court, and in February 1975 amended this complaint to charge all defendants with defamation, invasion of privacy, state constitutional violations and deprivation of his civil rights. On March 4, 1975, the defendants removed this action to the United States District Court for the Eastern District of Michigan, Southern Division, wherein a series of motions were all decided adversely to plaintiff-appellant.

I. Federal Claims

The appellant contended in district court and before this court that Cahalan's actions in sending the letter to the legislature and releasing it to the press deprived him of his constitutional right to due process, in violation of 42 U.S.C. §1983. He also argued that Waldmeir and the Detroit News (the News Defendants) acted as "agents" of the prosecutor and therefore had likewise violated his rights under §1983. In March of this year, the Supreme Court rendered an opinion, *Paul* v *Davis*, — U.S. —, 44 U.S.L.W. 4337 (March 23, 1976), in which it rejected the position that "reputation alone, apart from some more tangible interests . . . is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." In *Paul* v. *Davis*, the plaintiffs defamation claim was based upon a police official's publication of a list of "active shoplifters," which included plaintiff's name and picture. Plaintiff had been arrested on a shoplifting charge, but that charge was subsequently dismissed. The Supreme Court found that these facts, based upon injury to plaintiff's reputation were insufficient to state a claim under §1983.

We find *Paul* v. *Davis* to be controlling in the instant case insofar as plaintiff-appellant's civil rights claims under §1983 are concerned. The appellant alleges that the "defendants, jointly and in concert, violated [his] right to due process in officially attaching guilt, prior to an opportunity to defend, and, thus, are subject to liability pursuant to 42 U.S.C. §1983." However, we conclude, as in *Paul* v. *Davis*, that:

> "[appellant] cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, [appellees' alleged] defamatory

publications, however seriously they may have harmed [appellant's] reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause." 44 U.S.L.W. at 4343.

II. State Claims

We next consider appellant's contention that the district court erred in deciding his state claims, which appellant contends should have been remanded to state court for resolution. We conclude that the district court correctly determined that it had pendent jurisdiction over the state claims at issue in this case, *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); that the state and federal claims derived "from a common nucleus of operative fact"; and that at the time of the district court's decision it could not be said that the federal "issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the district court." *Hagans* v. *Lavine*, 415 U.S. 528, 539 (1973). Therefore, we conclude that it was both within the power and discretion of the district court to reach the appellant's state law claims. *U.M.W.* v. *Gibbs*, *supra* at 725-26.

a. The News Defendants:

On appeal, appellant concedes that he is a "public figure" and that therefore the News Defendants enjoy a "qualified immunity" and the "actual malice" standard of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) is applicable. This constitutional standard requires that plaintiff prove that the News Defendants published with " 'actual malice' — that is with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 270. *Gertz* v. *Robert Welch, Inc.*, 418,

U.S. 323 (1974). This "actual malice" cannot be premised entirely on the language of the article itself. *Greenbelt Co-op Publishing Ass'n* v. *Bressler*, 398 U.S. 6, 10 (1970).

The question before this court is, therefore, whether a genuine issue of fact existed with regard to "actual malice" of the News Defendants. We conclude that the findings of the district court that the pleadings, affidavits and exhibits, read most favorably for plaintiff, lead inevitably to the conclusion that Waldmeir wrote his column relying exclusively upon the prosecutor's letter, that he reasonably relied upon the prosecutor's familiarity with the case, and that neither he nor the Detroit News had any indication that the contents of the letter were in any respect untrue, are not clearly erroneous.

We further conclude that appellees Waldmeir and the Detroit News enjoyed a qualified immunity to report the prosecutor's statement regarding this matter of great public interest, that no genuine issue of fact was raised in the district court as to the "actual malice" of these defendants, and that therefore the district court properly granted summary judgment as to these defendants.

b. The Prosecutor:

The district court found that in writing this letter and publishing it the prosecutor Cahalan was acting within the absolute immunity of his office. Traditionally, a prosecuting attorney has been considered not liable for damages for acts or omissions within the scope of his official duties. *Imbler* v. *Pactman*, — U.S. — (March 2, 1976); *Kenney* v. *Fox*, 232 F.2d 288 (6th Cir.), *cert denied sub nom. Kenney* v. *Killian*, 352 U.S. 855 (1956); *Bloss* v. *Williams*, 15 Mich. App. 228, 166 NW2d 520 (1968); 1 Harper & James, The Law of Torts §§5.22 & 4.3 (1956).

The rationale for this absolute immunity is that prosecuting attorneys perform a quasi-judicial function:

> "The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions . . ." *Yaselli* v. *Goff, supra*, 12 F.2d at 406.

However, a prosecuting attorney may also perform functions not quasi-judicial in nature although within the scope of his authority. *See*, *Imbler* v. *Pachtman*, *supra*, at note 33 and accompanying text. Michigan courts have recognized that as to functions more executive in nature a prosecutor may be liable for his actions. *Bloss* v. *Williams*, *supra*, 15 Mich. App. at 231-32.

In *Bloss* v. *Williams*, the court, quoting *Bauers* v. *Heisel*, 361 F.2d 581, 589 (3rd Cir. 1966), stated that:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability . . ." 15 Mich. App. at 232.

In the instant case, an order of *nolle prosequi* had been entered as to the murder charge against Lee Dell Walker. Therefore, with nothing currently before the court, we find it difficult to ascribe any judicial or quasi-judicial significance to the prosecutor's letter. Rather, we agree with the district court that sending the letter to the legislature and releasing it to the press was within the

scope of the prosecutor's general powers. The good faith of Cahalan in doing so would be a defense, *see*, *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974), but because a question of fact was raised by the pleadings, appellant should have been afforded an opportunity to prove that the prosecutor acted with malice. Therefore, we reverse the district court's granting of a summary judgment as to the prosecutor's liability under the state charges, and remand for a determination of the absence or presence of malice. In all other respects the Judgment of the District Court is affirmed.

APPENDIX B

ORDER DENYING PETITIONER'S MOTION FOR REHEARING

(United States Court of Appeals
for the Sixth Circuit)

(Filed November 5, 1976)

Before: Celebrezze, Peck and Miller, Circuit Judges.

Upon consideration of the petition for rehearing filed herein by Appellee Cahalan, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It Is Therefore Ordered that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk of Court

APPENDIX C

OPINION OF THE COURT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(No. 75-70380)

Opinion of the Court in the above-entitled matter before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan, on Wednesday, April 16, 1975.

The Court: Thank you, gentlemen.

For the last two or three days as much as I have had time my mind has been up to here with this case because I think it's an extremely important case and an extremely important issue. It would be an interesting case to take under advisement and to write an opinion on it except for the work involved and as far as totat time it would be a nice case to do it because it is so well briefed.

I want to compliment all of you for presenting your issues here so well. I must point out the Detroit News brief is one of the finest briefs I have ever read and one of the most thorough briefs, but I have to be so very careful we don't make a decision based on the total brief rather than upon the issues themselves. Sometimes that can happen.

This isn't a debating contest it's a question of determining the rights of litigants.

Looking at the Cahalan case first and not the civil rights action, the non-civil rights action against Prosecutor Cahalan, first, I must conclude as a matter of law he was acting in an official capacity, it wasn't in an

executive capacity. Whatever responsibilities, duties and rights Mr. Cahalan and his staff had with respect to Walker, so far as prosecuting Walker is concerned, I am talking about the actual prosecution of Walker and the attempt to convict him of murder had ended at the time he wrote the letter. There you can make an argument that it is quasi-judicial for a prosecutor to authorize a warrant to prosecute and so forth, a pretty good argument but we are not concerned with that. Whatever Cahalan was doing here he was doing in an executive capacity and, frankly, I can't see that his rights are much different that if it had been the Jackson County or Oakland County prosecuting attorney taking the same position.

Let's look at what was actually going on. There was a bill in the legislature, I guess it already passed one House, I don't know whether it passed, I forget whether it did or not, it doesn't matter. The bill was introduced by Senator Young on December 6, and said this: "A bill to make an appropriation from the General Fund of the State to reimburse Lee Dell Walker for time spent in state prison due —" it didn't say due to the fact the mistrial had been declared, it says "— due to a mistake in identity and false testimony."

Section 2 provides: "The money appropriated under the provisions of this Act is not made in payment of any claim for damages but is provided only out of humanitarian consideration." It didn't stop right there, it went on. It said, "—for the wrong done Lee Dell Walker by the citizens of the State."

This bill was nothing short of an absolute condemnation of the prosecutorial process in the State of Michigan and particularly in the County of Wayne and City of Detroit. Whatever the outer limits of the prosecuting attorney's responsibilities I don't have to define. I am satisfied that he was acting clearly within the scope of his function as an executive officer.

As I put it, one in questioning as a chief law enforcement officer in many respects is the person who has the responsibility for protecting the public by the prosecution of criminals and this bill, if it had passed really could have a very serious effect of undermining the public confidence in the prosecutorial system.

What Mr. Cahalan's letter was pointing out was that it was an effort by Mr. Cahalan to prevent the bill from being passed it was an effort by him to prevent the legislature from passing a bill which would seriously detract from his ability, the ability of his office to function effectively.

Whether or not Mr. Cahalan acted with malice, whether or not he was justified from a moral point of view or from a factual point of view of virtually calling Mr. Walker a murderer — and he did, he called him a murderer. You can't read that letter without saying, "this man committed murder."

Let's assume for a moment that would be liable but for privilege, I am satisfied that Mr. Cahalan was acting with the cloak of absolute privilege in writing this letter. It isn't a qualified privilege so far as Cahalan is concerned, it's an absolute privilege. He had a duty, he was acting within the scope of his duty and for that reason the partial summary judgment is granted against Mr. Cahalan.

Now can we get over to the Detroit News and Mr. Waldmeir, they are exactly the same, they are in exactly the same position so far as I can see. I have a great deal of trouble in applying this, I would have trouble in applying this absolute privilege to them. If Mr. Waldmeir had taken Mr. Cahalan's letter and printed it as a public event — I forget the language of the statute — let me look it up.

If they had been printing it as a public and official proceeding in its entirety and I think the letter itself was

an official proceeding, I find it almost impossible to distinguish between Mr. Cahalan's right to write the letter as a public official and the fact it is an official proceeding. Those ideas are almost synonymous and in this context they are.

If Mr. Waldmeir in his article or news story said, "This is the letter that Cahalan wrote to the members of the legislature" or paraphrased it some, if he had really carried forward the idea that this is the news story of what happened, this is what Cahalan wrote in its entirety, then I think that the statute would apply. As it is I think the statute applies only in part.

Mr. Waldmeir is either a very fortunate man or he was pretty well versed upon what his rights were and what the scope of his privileges, both absolute and limited, were because in his article the part of the article that really can be said to call Walker a murderer he was quoting pure and simple. To that last paragraph, the last paragraph in quotes, he was indeed reporting an official proceeding. He was quoting from the letter that went from Cahalan to the legislature and there is no requirement that he quote the whole thing.

The rest of the article, I can't quite bridge the gap and say the information was the same as is Cahalan's letter so he has this same absolute immunity. I think with respect to the rest of the article, including the article as a whole as distinguished from the quote itself, we are dealing with a conditional immunity or a limited or qualified immunity. I am not as acquainted with the distinction perhaps as you gentlemen are in the use of the word but it was a qualified immunity under the limitations imposed or spelled out by the United States Supreme Court.

Then we get to the issue do the pleadings frame an issue as to malice, malice, as defined by the Supreme Court? Is there any real factual issue as to whether or not Waldmeir and the Detroit News were acting with

knowledge of falsity or with reckless disregard of the consequences? Quite to the contrary. There is just no suggestion whatsoever of falsity here. There is no suggestion whatsoever of knowledge of falsity. There is no suggestion of reckless disregard of the consequences.

There is a showing, it's not denied — perhaps I jumped over something here and I will get to it. There is a showing in any event that Waldmeir and the Detroit News were relying on sources which appeared to them to be reliable. Almost everything they quote, right down the line, every fact they quote has a substantial basis in the public record.

Was Walker a public figure? Certainly his public figure status was thrust upon him. If you had to take a voluntary position to be a public figure, to be a columnist in a newspaper, to run for office, to be at least those, those are voluntary actions. You can't say that whatever he may or may not have done several years ago in the way of the commission of a crime, you can't say that Walker chose to be convicted. You can't say he chose to be in prison. The public figure aspects of his case were thrust upon him through the appellate process.

Walker was trying to get a rehearing on the issue of voluntariness by his appellate process. He was not seeking to get to be famous anymore than Miranda was, I suppose, or Escobedo. Walker, in Michigan, has much the same meaning as Miranda and Escobedo on a national scale. In every court in the State of Michigan, every state court, day after day, week after week, we hear of Walker hearings, and it has even become sophisticated to the point where it's not a confession but a search and seizure. Here it's a Walker hearing and there is a distinction between a Walker hearing and Walker-type hearing.

Then the whole series of newspaper articles in the Free Press, whether Walker is responsible for them or not, did

in fact bring his case to the public light and by the time the motion to dismiss his prosecution was granted he was very much a public figure. He was probably the best known convicted criminal in the history of the State of Michigan up to the time that the action against him was dismissed and he ceased to be a convicted murderer.

Up to that point though, as far as the public is concerned, he was. Then the case against him was dismissed. If it is stopped right there and two or three years later, four or five years later if some newspaper wanted to pick it up and say, "What happened to Lee Dell Walker over the years?" and reinstitute a series of articles after he rehabilitated himself in society and gone into private life, you could very well argue, the argument would be very persuasive that he ceased to be a public figure but did he cease to be a public figure? No. He was going down to the State of Michigan and trying to get the State of Michigan to do two things apparently, at least there is an effort being made which he was not adverse to to have the legislature declare he had been wronged and also to give him $25,000 of public money. He was still very much a public figure and that brought us back to the application of the limited or conditional or qualified privilege. I find there is no evidence of it, none whatsoever, no suggestion of a factual issue with respect to malice or with respect to knowledge of falsity, with respect to requisite disregard.

This is the peculiar thing about this case. Most of the cases that you read there is some glaring falsity and the immunity cases — and the newspapers are falling back upon immunity because, notwithstanding some glaring falsity. That certainly doesn't appear in this case and that is relevant as it bears on the issue of malice, therefore, gentlemen your motion for partial summary judgments are granted.

I certainly think you have a very viable law suit at this point with respect to the civil rights action and I suppose we will see more of you in time to come.

Mr. Fink: Thank you.

Certificate

I, Donald E. Miller, Court Reporter, hereby certify I reported in shorthand the proceedings had in the within-entitled cause before Honorable James P. Churchill, United States District Judge, at Detroit, Michigan on April 16, 1975, and that the foregoing is a full, true and correct transcript of the opinion of the Court taken at said time and place according to my shorthand notes.

/s/ Donald E. Miller
211 Federal Building
Detroit, Michigan
226-3680

Dated: May 2, 1975.

APPENDIX D

SENATE BILL NO. 1050

December 6, 1973, Introduced by Senator Young and referred to the Committee on Appropriations.

A bill to make an appropriation from the general fund of the state to reimburse Lee Dell Walker for time spent in state prison due to mistake in identity and false testimony.

THE PEOPLE OF THE
STATE OF MICHIGAN ENACT:

Sec. 1. There is appropriated from the general fund of the state the sum of $25,000.00, to partially reimburse Lee Dell Walker, born January 28, 1913 at Texarkana, Texas, residing at 18750 Woodward Avenue, Detroit, Michigan for time spent in state prison due to a mistake in identity and false testimony.

Sec. 2. The money appropriated under the provisions of this act is not made in payment of any claims for damages, but is provided solely out of humanitarian consideration for the wrong done Lee Dell Walker by the citizens of the state.

APPENDIX E

PETITIONER CAHALAN'S LETTER TO APPROPRIATIONS COMMITTEE

County of Wayne
Office of the Prosecuting Attorney
Detroit, Michigan

(September 19, 1974)

Honorable William R. Copeland, Chairman, and Members House Committee on Appropriations, Capitol Building, Room 118, Lansing, Mi. 48902.

Gentlemen:

The Senate passed Senate Bill 1050, providing for the payment of $25,000 to Lee Dell Walker "for the wrong done to Lee Dell Walker by the citizens of the State of Michigan . . . due to mistake in identity and false testimony."

No wrong was done to Lee Dell Walker. There was no mistake in identity. There was no false testimony.

Lee Dell Walker was justly convicted of a crime that he committed — the murder of John Drousitious.

On February 17, 1954, two men robbed, shot, and killed John Drousitious in his grocery store in the City of Detroit.

On March 26, 1954, a man attempted to rob a bank messenger. The man attempting this robbery escaped in Lee Dell Walker's automobile.

On March 27, 1954, Walker was arrested for this — the bank messenger robbery — and for violation of parole. He was placed in a police lineup and was identified as having participated in the bank messenger robbery.

Walker confessed to having committed two other robberies — a market on 2900 W. Euclid on February 15, 1954, and Brown's Restaurant at 4412 Beaubien, on March 25, 1954.

Walker's automobile was searched, and a gun was found hidden under the hood. That gun was examined by ballistics and found to have been the weapon that fired the shot that murdered John Drousitious and that fired shots in the Euclid Avenue robbery confessed to by Walker.

At the time of Walker's arrest, he had in his possession a wristwatch stolen from a customer during the Euclid Avenue robbery.

Walker confessed that he murdered John Drousitious during the perpetration of the robbery of his grocery store.

Walker identified the widow of John Drousitious as the woman who was in the store at the time that he killed John Drousitious.

Walker was tried for the murder of John Drousitious; and on June 28, 1954, a jury convicted him of murder in the first degree. On September 2, 1961, a motion for a new trial was denied by the trial court. Subsequently, the Michigan Supreme Court reviewed the case and affirmed the conviction — People v. Walker, 371 Mich 599 (1963).

At the time of Walker's trial, it was the law that the voluntariness of the confession would be determined by the trial jury. Ten years later the United States Supreme Court in the case of Jackson v. Denno, 378 US 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964), decided new law stating that the same jury that decides the defendant's guilt or innocence may not also decide the voluntariness of the defendant's confession.

Following the Denno decision, the Michigan Supreme Court, on a rehearing, remanded the Walker Case to the trial judge directing him to hold an evidentiary hearing on the voluntariness of the confession. 374 Mich 331 (1965)

The trial judge did hold an evidentiary hearing on the voluntariness of the confession and concluded that the confession was, in fact, voluntary.

That decision by the trial judge was appealed to the Court of Appeals. The Court of Appeals affirmed the trial judge once again. 6 Mich App 600 (1967)

The decision of the Court of Appeals affirming the trial judge was appealed to the Michigan Supreme Court. The Michigan Supreme Court refused to rehear the case which, in effect, affirmed the decision of the trial judge and the Court of Appeals. 379 Mich 781 (1967)

The United States Supreme Court was asked to review the decision of the Michigan Supreme Court. The United States Supreme Court refused to do so. 393 US 1028, 89 S.Ct. 637, 21 L.Ed. 2d 572 (1969)

Eighteen years later, Recorder's Court Judge Robert Evans, on May 15, 1972, reviewed the case and entered an order granting Walker a new trial. Judge Evans held that the confession by Walker to the murder of John Drousitious was inadmissable. In effect, Judge Evans reversed the ruling of another Recorder's Court judge, the Court of Appeals, the Michigan Supreme Court, and the United States Supreme Court. His opinion is contrary to the law as it existed at the time of the trial and as it exists now. Unfortunately, however, the People had no automatic right to appeal. The People's request for a review of Judge Evan's rulings by the Court of Appeals was denied on September 21, 1972.

The People are stuck with the rulings of Judge Evans.

There is no way that we can retry this defendant. The witnesses have died, and the evidence has been destroyed.

There has never been a finding that Walker was innocent — even by Judge Evans — nor could there be such a finding. Lee Dell Walker murdered John Drousitious. There is no other conclusion that can be reached by any fair-minded person who reviews the evidence in this case. In fact, a jury concluded beyond all reasonable doubt that Walker did, in fact, murder John Drousitious.

The lesson learned is that if a criminal tries long enough and hard enough and if he goes through enough judges, sooner or later he will find one sympathetic to his cause.

If Lee Dell Walker is to be rewarded with $25,000, give it to him for his persistence. Do not commit the final perversion of stating that a guilty man is innocent.

Very truly yours,

/s/ William L. Cahalan
Prosecuting Attorney
County of Wayne

WLC:mg

cc: House Committee on Appropriations, Chairman: William R. Copeland, Members: Dominic J. Jacobetti, James S. Farnsworth, Bobby D. Crim, Russell Hellman, Bill S. Huffman, Raymond C. Kehres, Dale E. Kildee, Earl E. Nelson, Gary M. Owen, Joseph M. Snyder, Richard A. Young, James J. Damman, House Committee on Appropriations, Members: Melvin DeStigter, William L. Jowett, Peter Kok, Thomas G. Sharpe, Hon. Bobby D. Crim, Majority Leader; Hon. Clifford H. Smart, Minority Leader; Hon. James H. Brickley, Lieutenant Governor.

Supreme Court, U. S.
FILED
MAR 22 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1008

WILLIAM CAHALAN,

Petitioner,

vs.

LEE DELL WALKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's brief misstates the nature of the legal issue sought to be reviewed. The issue is whether, *under Michigan Law,* the Defendant prosecutor had an absolute privilege to allege and disseminate to the News Media that the respondent was guilty of murder when there was no valid conviction or pending criminal proceeding against the Respondent.

STATEMENT OF CASE

Respondent takes exception to the slanted factual presentment contained in the Petitioner's brief and relies upon the factual statement contained in the Opinion of the United States Court of Appeals for the Sixth Circuit.

———o———

ARGUMENT

Preliminarily, it must be clearly indicated that the basis of Respondent's claim is not that Petitioner sent his letter of September 19, 1974, to the members of the legislative committee but that this letter was indiscriminately disseminated to the general public through the news media.

In his ruling, the district court Judge apparently was relying on the absolute privilege expressed in *Barr v. Mateo,* 360 U. S. 564, 79 S. Ct. 1335 (1959), as he theorized along the lines enunciated in *Barr* [Petitioner's Brief Appendix C, p. 24]. Respondent respectfully submits that the actions of Petitioner were not encompassed within *Barr's* absolute immunity. In *Barr,* this Court held that the press release of the defendant, which defended his *own* integrity from *direct* charges—though a "close" question was "within the outer perimeter of petitioner's line of duty. . . ." 360 U. S. 564, 574-575, 79 S. Ct. 1335-1341 (1959). Here, Petitioner was not acting within the "outer perimeter of his line of duty. . . ." His capacity was inextricably connected with the prosecutorial system. It is

not within his realm of authority—legally or morally—to publicly villify as criminals those citizens he believes cannot be convicted in a court of law. Senate Bill 1050 cannot, by any stretch of the imagination, be considered an attack upon Cahalan individually. Nor, indeed, could the Bill be characterized as an attack upon the prosecutorial system. In fact the Bill omitted any reference to police or prosecutorial misconduct concerning Walker's coerced confession.

Moreover, the district court was obliged to follow Michigan law on this question as *Barr* was not limited to the liability of Federal Officials. *Barr v. Mateo, supra,* at 565, *supra,* at 1336. *See Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed 118 (1936). The Michigan case law, in contrast to *Barr,* would not provide immunity to Cahalan. *Madill v. Currie,* 168 Mich. 546, 134 N. W. 1004 (1912); *Brunn v. Weiss,* 32 Mich. App. 428, 188 N. W. 2d 904, 905 (1971) ("The publication of a newsletter may be closely enough related to the official duties of the board members to give them a conditional privilege, but there is no absolute privilege").

A recent decision by the Michigan Court of Appeals, which conveniently was omitted from the selective review of "Michigan Law" contained in Petitioner's brief, is *Tocco v. Piersante,* 69 Mich. App. 616, 245 N. W. 2d 356 (1976). This case directly refutes the Petitioner's claim that the U. S. Court of Appeals for the Sixth Circuit misconstrued state law. In *Tocco,* the Court, following a review of Michigan precedent, held that a high official in the State Attorney General's Office was entitled to qualified, and not absolute, privilege in a defamation action not

arising out of judicial action. Given only a qualified privilege, the court reversed the lower court's grant of summary judgment. Clearly, *Tocco,* with its direct analogy to the instant case, mandates rejection of Petitioner's Writ. See also, *Stewart v. Troutt,* (Mich. Ct. of Appeals, No. 26246, Jan. 17, 1977) (absolute privilege only when councilman undertaking official duties).

Absolute immunity would only attach to the Petitioner if he acted within the scope of a judicial proceeding. *Bauers v. Heisel,* 361 F. 2d 581, 589 (3d Cir. 1966), which was adopted by the Michigan Courts in *Blass v. Williams,* 15 Mich. App. 228, 166 N. W. 2d 520 (1969), provides the relevant framework:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are *sufficiently judicial* as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions.
>
> "The rationale is set forth in Yaselli v. Goff (CA 2, 1926), 12 F. 2d 396, 406:
>
> "'• • • The public interest requires that persons occupying such important positions and so closely identified with the *judicial departments* of the government should speak and act freely and fearlessly in the discharge of their important official functions. • • •" (Emphasis added.)

The emphasis on "sufficiently judicial" and "judicial departments" indicates that only where the prosecutorial conduct is *within the judicial process* does the doctrine of judicial immunity apply. Hence once the judicial process had been terminated by the entry of the order of nolle

prosequi, the doctrine of judicial immunity was rendered inapplicable. Consequently, the United States Court of Appeals for the Sixth Circuit properly applied Michigan Law.

———o———

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: March 21, 1977